A

Setiausaha Kerajaan Negeri Selangor (Perbadanan) v Perbadanan Riadah Sdn Bhd and another appeal

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-01–343–09 OF 2014 AND B-02–1520–09 OF 2014
BALIA YUSOF, HAMID SULTAN AND BADARIAH SAHAMID JJCA
26 MAY 2016

C

Civil Procedure — Judicial precedent — Binding force — Extent to which lower courts are obliged to follow principles enunciated by higher courts — Judicial precedents to be applied subject to facts of case at hand, commercial consideration and public policy

D

Constitutional Law — Judiciary — Role of judiciary — Whether judiciary to uphold public policy — Whether courts to strike down transactions which are against public policy even if they are in accordance with general commercial or tortious principles

E

Contract — Agreement — Breach — Plaintiff demonstrating dilatory conduct and disinterestedness to proceed with project — Project not viable — Claim purely based on technical default — Whether plaintiff's action for breach an abuse of process of court — State exchequer bound to be short-changed if claim allowed — Failure to prove genuine breach of contract — Claim dismissed

F

Contract — Damages — Proof, of — Failure to prove losses caused by alleged breached — Damages not allowed

G

Contract — Illegality — Public policy — Transaction which cause taxpayers to be short-changed — Whether against public policy — Whether courts to strike down such transactions even if they are in accordance with general commercial or tortious principles — Contracts Act 1950 s 24

H

(This judgment must be read with the judgment of the High Court reported as [2014] MLJU 836 for comprehensiveness, as well as to appreciate the facts and arguments originating from the High Court.) There were two appeals relating to the same decision of the learned trial judge. The first appeal was No B-01–343–09 of 2014 and the appellant was the first defendant in the court below. The second appeal was No B-02–1520–09 of 2014 and the appellant was the plaintiff in the court below. The plaintiff who was a developer entered

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into a joint venture with the state's agency, namely the first and second defendants to develop the property for a specific purpose, namely: Housing and Industrial Project in Sepang, Selangor. The first defendant was to give vacant possession within six months but this did not take place and neither did the plaintiff demand vacant possession. It was also within the knowledge of the plaintiff that the said land was leased by the state and/or its agencies for the purpose of sand dredging activities by third parties. The said lease could be terminated and vacant possession could be given.

Held, allowing the appeal No B-01–343–09 of 2014 and dismissing the appeal No B-02–1520–09 of 2014 with costs:

(1) The trial judge had heavily relied on a similar case where the Court of Appeal had allowed the plaintiff's claim there. Whilst the lower courts are obliged to follow the legal principles enunciated by the higher courts, they however have freedom to apply the legal principles to the facts of the case and make an independent assessment whether or not to allow or dismiss the claim (see paras 8–9).

(2) A decision cannot be just based on judicial precedent on the law per se but also the facts, inclusive of commercial consideration. In addition, where the state or its agencies are involved, the court must consider whether the taxpayers will be short-changed by merely subscribing to technical arguments. The law on public policy is covered in s 24 of the Contracts Act 1950. However, its parameters are much wider where it involves the states and/or its agencies (see para 10).

(3) When the exchequer is directly and/or indirectly short changed by dubious claim and/or technical claim whether or not it arises in consequence of private contract or conduct of government or government agencies, it rests upon the court to arrest it though it may appear from the face of the record that the claim is justified according to general commercial or tortious principles, etc. The judiciary has a greater role to play than the judges in England relating to public policy and its like (see para 11).

(4) Whether it is a pleaded case of the parties or not is a non-issue when it relates to illegality, public policy or issues such as, where the states exchequer will be short-changed (see para 12).

(5) The issue of vacant possession on the facts of the case was purely a technical issue and that could not culminate to a cause of action to seek damages and that too in millions of ringgit; that too when there was clear evidence and admission by the plaintiff to suggest that they could not have proceeded with the joint venture agreement profitably (see para 13).

(6) The court has taken the concept of commercial reality as a consideration in construing contractual terms and enforcement thereof in various circumstances (see para 15).

(7) The plaintiff was disinterested in pursuing the joint venture agreement. Further, the plaintiffs' had also evinced an intention not to continue with the agreement just before the expiry of the joint venture agreement unless the defendant was prepared to consider the variations which in ordinary terms will stand as a counter offer which technically meant that the plaintiff had no interest to proceed with the joint venture (see para 16).

(8) The plaintiffs had demonstrated dilatory conduct as well as disinterestedness to proceed with the project for six years. In addition, the plaintiff by the letter dated 5 April 2001 made suggestion that the project was not viable. The plaintiff's action was an abuse of process of the court and the action ought to have been dismissed at limine (see para 19).

(9) By allowing a claim purely based on a technical default, the state exchequer was bound to be short-changed and the court ought to have balanced the contractual rights with public interest in cases of this nature to arrive at a just decision. In the instant case, that was not done and in consequence the integrity of the decision making process had been compromised. It would have been different if the plaintiff had suffered loss and damage in consequence of genuine breach of the state and/or state agencies and where the plaintiffs had given due notice and time to remedy the breach. In the instant case, there was none (see para 22).

[Bahasa Malaysia summary

(Penghakiman ini hendaklah dibaca bersama dengan penghakiman Mahkamah Tinggi yang dilaporkan sebagai [2014] MLJU 836 untuk pemahaman, dan juga untuk menilai fakta dan hujahan bermula dari Mahkamah Tinggi.) Terdapat dua rayuan berkaitan dengan keputusan hakim yang bijaksana. Rayuan pertama adalah No B-01–343–09 Tahun 2014 dan perayu adalah defendan pertama di mahkamah bawah. Rayuan kedua adalah No B-02–1520–09 Tahun 2014 dan perayu adalah plaintif di mahkamah bawah. Plaintif yang merupakan seorang pemaju memasuki satu perjanjian usaha sama dengan agensi negeri, iaitu defendan pertama dan kedua untuk membangunkan hartanah untuk satu tujuan tertentu, iaitu: Projek Perumahan dan Industri di Sepang, Selangor. Defendan pertama hendaklah memberikan milikan kosong dalam tempoh enam bulan tetapi itu tidak berlaku dan plaintif juga tidak menuntut milikan kosong. Ia juga adalah di dalam pengetahuan plaintif bahawa tanah tersebut telah dipajak oleh negeri dan/atau agensi-agensinya bagi tujuan aktiviti mengorek pasir oleh pihak ketiga. Pajakan tersebut boleh ditamatkan dan milikan kosong boleh diberikan.

Diputuskan, membenarkan rayuan No B-01–343–09 Tahun 2014 dan

menolak rayuan No B-02–1520–09 Tahun 2014 dengan kos:

(1) Hakim bicara terlalu bergantung kepada kes yang sama yang mana Mahkamah Rayuan telah membenarkan tuntutan plaintif di situ. Sementara mahkamah bawahan adalah bertanggungjawab untuk mengikuti prinsip undang-undang yang dinyatakan dengan jelas oleh Mahkamah Tinggi, mereka walau bagaimanapun mempunyai kebebasan untuk mengguna pakai prinsip undang-undang kepada fakta kes dan membuat penilaian bebas sama ada atau tidak untuk membenarkan atau menolak tuntutan itu (lihat perenggan 8–9).

(2) Satu keputusan tidak boleh hanya berdasarkan duluan kehakiman undang-undang semata-mata tetapi juga fakta, termasuk pertimbangan komersial. Sebagai tambahan, di mana negeri atau agensinya terlibat, mahkamah perlu mempertimbangkan sama ada pembayar cukai akan ditipu dengan hanya menerima hujahan teknikal. Undang-undang untuk polisi am adalah terangkum di dalam s 24 Akta Kontrak 1950. Walau bagaimanapun, parameternya adalah lebih luas di mana ia melibatkan negeri dan/atau agensinya (lihat perenggan 10).

(3) Apabila exchequer adalah secara langsung dan/atau tidak langsung ditipu dengan tuntutan yang diragui dan/atau tuntutan teknikal sama ada atau tidak ia dibangkitkan akibat daripada kontrak swasta atau tindakan kerajaan atau agensi kerajaan, ia terletak atas mahkamah untuk menghentikannya walaupun ia mungkin kelihatan pada zahir laporan bahawa tuntutan itu adalah wajar menurut prinsip komersial am atau tort dan lain-lain. Penghakiman mempunyai peranan yang lebih besar untuk dimainkan daripada hakim-hakim di England berkaitan dengan polisi am dan yang sepertinya (lihat perenggan 11).

(4) Sama ada ia adalah kes yang diplidkan oleh pihak-pihak atau tidak ia bukanlah satu isu apabila ia berkaitan dengan kesalahan undang-undang, polisi dan/atau isu-isu sebegitu, di mana perbendaharaan negeri akan ditipu (lihat perenggan 12).

(5) Isu milikan kosong pada fakta kes adalah semata-mata isu teknikal dan itu tidak boleh berakhir dengan kausa tindakan untuk memohon ganti rugi dan yang melampau dalam jutaan ringgit; yang juga apabila terdapat keterangan jelas dan pengakuan oleh plaintif yang mencadangkan bahawa mereka tidak boleh meneruskan dengan perjanjian usaha sama yang menguntungkan (lihat perenggan 13).

(6) Mahkamah telah mengambil konsep realiti komersial sebagai pertimbangan dalam mentafsirkan terma kontraktual dan penguatkuasaannya dalam pelbagai keadaan (lihat perenggan 15).

(7) Plaintif tidak berminat untuk meneruskan perjanjian usaha sama. Selanjutnya, plaintif juga telah menunjukkan niat untuk tidak

meneruskan dengan perjanjian hanya sebelum tamat tempoh perjanjian usaha sama melainkan sekiranya defendan bersedia untuk mempertimbangkan variasi yang mana dalam terma biasa akan berdiri sebagai tawaran balas yang secara teknikal bermakna plaintif tidak mempunyai minat untuk meneruskan dengan usaha sama (lihat perenggan 16).

(8) Plaintif telah menunjukkan perilaku sembrono serta tidak berminat untuk melanjutkan dengan projek selama enam tahun. Selain itu, plaintif dengan surat bertarikh 4 Mei 2001 membuat cadangan bahawa projek itu adalah tidak berdaya maju. Tindakan plaintif adalah penyalahgunaan proses mahkamah dan tindakan, sepatutnya, ditolak limine (lihat perenggan 19).

(9) Dengan membenarkan tuntutan semata-mata berdasarkan kegagalan teknikal, perbendaharaan negeri pasti akan ditipu dan mahkamah sepatutnya mempunyai hak kontraktual yang seimbang dengan kepentingan awam dalam kes seperti ini untuk mencapai keputusan yang adil. Dalam kes ini, ia tidak dilakukan dan akibatnya integriti proses membuat keputusan telah dikompromi. Ia akan berlainan jika plaintif mengalami kehilangan dan kerugian akibat daripada pelanggaran yang betul, oleh negeri dan/atau agensi negeri dan di mana plaintif telah diberikan notis dan masa untuk meremedikan pelanggaran itu. Di dalam kes ini, tidak ada (lihat perenggan 22).]

Notes

For a case on binding force, see 2(3) *Mallal's Digest* (5th Ed, 2015) para 5531.
For cases on breach, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3278–3286.
For cases on damages in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 4587–4814.
For cases on judiciary in general, see 3(2) *Mallal's Digest* (5th Ed, 2015) paras 2959–2963.
For cases on public policy, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5773–5775.

Cases referred to

Ayr Harbour Trustees v Oswald [1883] 8 App case 623, HL (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Best v Wellcome Foundation Ltd [1994] 5 Med LR 81, SC (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal [2014] 5 MLJ 1; [2014] 7 CLJ 644, CA (refd)
Dato' Sri Zulkifli bin Omar & Ors v Ahmad Skhri bin Ramli and another appeal [2015] 3 MLJ 669 ; [2015] 3 CLJ 752, CA (refd)
Hillas & Co Ltd v Arcos Ltd [1932] All ER Rep 494, HL (refd)

Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd [2015] 2 MLJ 509, CA (refd)
Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors [2015] 3 MLJ 791, CA (refd)
Marks and Spencer plc (appellant) v BNP Paribas Securities Services Trust Company (Jersey) Limited and another (respondents) [2015] UKSC 72, SC (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)
Perbadanan Riadah Sdn Bhd v Setiausaha Kerajaan Negeri Selangor (Perbadanan) & Anor [2015] 11 MLJ 422; [2014] 1 LNS 942; [2014] AMEJ 0966, HC (refd)
Sejati Education Sdn Bhd v S3M Development (Sabah) Sdn Bhd [2016] 2 MLJ 98, CA (refd)

Legislation referred to

Contracts Act 1950 s 24

Appeal from: Civil Suit No MT2–21–77 of 2007 (High Court, Shah Alam)

Ravi Nekoo (Indrani Marimuthu with him) (Jamaludin Ibrahim & Assoc) for the appellant.
Bastian Vendargon (Anne Vendargon with him) (Bastian Vendargon) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] There are two appeals before us relating to the same decision of the learned trial judge. The first appeal is No B-01–343–09 of 2014 and the appellant is the first defendant in the court below. The second appeal is No B-02–1520–09 of 2014 and the appellant is the plaintiff in the court below.

[2] The parties had agreed that Appeal No B-01–343–09 of 2014 should be heard first and will be bound by the decision to decide the fate of the second appeal.

[3] We heard the appeals on 1 July 2015 and allowed the Appeal No B-01–343–09 of 2014 and dismissed Appeal No B-02–1520–09 of 2014. My learned brother Balia Yusof bin Haji Wahi JCA and learned sister Badariah bt Sahamid JCA have read the judgment and approved the same.

[4] This judgment must be read with the judgment of the High Court reported as *Perbadanan Riadah Sdn Bhd v Setiausaha Kerajaan Negeri Selangor (Perbadanan) & Anor* [2015] 11 MLJ 422; [2014] 1 LNS 942; [2014] AMEJ

A 0966 for comprehensiveness, as well as to appreciate the facts and arguments originating from the High Court.

BRIEF FACTS

B **[5]** The facts of the case had been set out in detail by the learned judge. We do not wish to labour on that save to say: (a) the plaintiff who is a developer entered into a joint venture with the state's agency, namely the first and second defendants to develop the property for a specific purpose, namely: Housing and Industrial Project in Sepang, Selangor; (b) the first defendant was to give C vacant possession within six months; (c) that did not take place; neither did the plaintiff demand vacant possession; and (d) it was also within the knowledge of the plaintiff that the said land was leased by the state and/or its agencies for the purpose of sand dredging activities by third parties. The said lease can be terminated and vacant possession can be given. This issue is not in dispute. D

[6] The memorandum of Appeal No B-02–1520–09 of 2014 reads as follows:

E (1) the learned judge erred in law and in fact in dismissing the appellant's/plaintiff's claim against the respondent/second defendant;

(2) the learned judge erred in law and in fact in finding that the respondent/second defendant was 'more the project manager and agent of the first defendant';

F (3) the learned judge erred in law and fact in finding that the respondent/second defendant 'should also be found as an agent that is personally and separately liable pursuant to s 183 of the Contract Act 1950';

G (4) the learned judge erred in law in his appreciation of s 183 of the Contract Act 1950;

(5) the learned judge failed to appreciate the fact that the respondent/second defendant was a party to the joint-venture agreement;

H (6) the learned judge failed to take into account that the respondent/second defendant's duties and obligations to the appellant/plaintiff are stated in the joint venture agreemen; and

(7) the learned judge erred in law and fact in finding respondent/second defendant is the agent of the first defendant.

I **[7]** The memorandum of Appeal No B-01–343–09 of 2014 reads as follows:

(a) Yang Arif Hakim Pesuruhjaya Kehakiman Yang Bijaksana telah khilaf di sisi undang-undang dan fakta kerana memutuskan liabiliti adalah

terhadap Perayu. Sebelum perbicaraan penuh kes tersebut, pihak-pihak telah bersetuju untuk buktikan ('establish') liabiliti sahaja dan gantirugi akan ditaksirkan kemudian;

(b) Yang Arif Hakim Pesuruhjaya Kehakiman Yang Bijaksana telah khilaf di sir! undang-undang dan fakta kerana gagal mengambil kedudukan undang-undang bahawa sebagai pihak-pihak kepada suatu Perjanjian Usahasama, Perayu dan Responden mempunyai hubungan fidusiari di antara satu sama lain;

(c) Yang Arif Hakim Pesuruhjaya Kehakiman Yang Bijaksana telah khilaf di sisi undang-undang dan fakta kerana gagal mengamati kedudukan undang-undang bahawa klausa-klausa 2(i), 2(xviii), 2(xxxvii), 2(xxxxi), 17(ii), Perjanjian Usahasama bertarikh 7.4.1995 diantara Perayu dan Responden mengandungi janji-janji bersaling dimana pihak Responden telah gagal mematuhinya;

(d) Yang Arif Hakim Pesuruhjaya Kehakiman Yang Bijaksana telah khilaf di sisi undang-undang dan fakta kerana gagal mengamati bahawa terdapat pelbagai keterangan ('overwhelming evidence') bahawa pada setiap masa yang material Responden telah memungkiri Perjanjian Usahasama tersebut berdasarkan fakta-fakta berikut:

(i) Sungguhpun masa merupakan intipati Perjanjian Usahasama tersebut dan bahawa Responden mempunyai obligasi untuk memulakan projek tanah tersebut namun sehingga tamatnya tempoh perjanjian, Responden belum bersedia untuk memulakan projek tersebut.

(ii) Surat-surat Responden bertarikh 5.3.2001 dan 5.4.2001 meminta Perayu untuk menukar projek daripada perindustrian kepada kediaman bercampur jelas terbukti bahawa Responden tidak bersedia untuk memulakan projek tersebut. Responden juga telah memberi beberapa alasan untuk tidak memulakan projek tersebut.

(iii) Dari mulanya tarikh Perjanjian Usahasama, Responden tidak berusaha untuk memajukan projek tersebut atas alasan-alasan berikut, pengurangan drastik terhadap permintaan industri, mengelakkan kerugian kepada pelbagai pihak, meningkatnya permintaan terhadap kawasan kediaman dan menggalakkan penjualan unit kediaman yang berpatutan.

(e) Yang Arif Hakim Pesuruhjaya Kehakiman Yang Bijaksana telah khilaf di sisi undang-undang dan fakta apabila membenarkan alasan Responden yang menyatakan Responden tidak dapat memulakan projek tersebut kerana milikan kosong tidak diserahkan kepada Responden kerana pengambilan pasir dijalankan di atas tanah tersebut. Syarikat Kazabina Sdn Bhd diberi permit pengambilan pasir. Permit itu diberi berkala untuk setiap satu bulan supaya pengambilan pasir boleh dihentikan dengan serta merta apabila Responden bersedia untuk memulakan projek;

(f) Yang Arif Hakim Pesuruhjaya Kehakiman Yang Bijaksana telah khilaf di sisi undang-undang dan fakta apabila memutuskan bahawa ia adalah tidak penting ('immaterial') jika Responden bersedia atau tidak untuk memajukan tanah tersebut tetapi fakta bahawa Perayu tidak menyerahkan milikan kosong tanah tersebut adalah penting;

(g) Yang Arif Hakim Pesuruhjaya Kehakiman Yang Bijaksana telah khilaf di sisi undang-undang dan fakta apabila memutuskan bahawa masa untuk bayaran premium tanah tidak ditetapkan oleh itu ia boleh dilakukan dalam masa yang berpatutan ('reasonable time'). Walaubagaimanapun, sehingga luput tarikh Perjanjian Usahasama tersebut Responden masih belum membayar premium tanah untuk memajukan tanah tersebut. Ini jelas menunjukkan Responden tidak bersungguh-sungguh untuk memajukan tanah tersebut. Lagipun, apakah masa yang berpatutan yang dipandukan;

(h) Berdasarkan perkara-perkara yang dirujuk di atas, Perayu memohon agar rayuan ini dibenarkan dengan kos.

PRELIMINARIES

[8] In the instant case, the learned trial judge had written a meticulous judgment setting out the facts and law but heavily relying on a similar case where the Court of Appeal has allowed the plaintiff's claim there.

[9] At the outset, we must say without doubt that the lower courts are obliged to follow the legal principles enunciated by the higher courts but however, they have freedom to apply the legal principles to the facts of the case and make an independent assessment whether or not to allow or dismiss the claim. In *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597, the Federal Court asserted that in interpreting a private contract the court is obliged to look at the factual matrix forming the background of the transaction and also should adopt an objective approach. His Lordship Zulkefli Makinudin FCJ had this to say:

> [42] Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See *Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkins & Sons (a firm) & Ors; Alford v West Bromwich Building Society & Ors; Armitage v West Bromwich Building Society & Ors* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA (in liquidation) v Ali & Ors* [2001] 2 WLR 735:

> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language used by the parties against the background of the surrounding circumstances.

[10] It must not be forgotten that a decision cannot be just based on judicial precedent on the law per se but also the facts, inclusive of commercial consideration. In addition, where the state or its agencies are involved, the court must consider whether the taxpayers will be short-changed by merely subscribing to technical arguments. English courts consideration on public policy grounds will not allow the exchequer to be short-changed. To some extent, the law on public policy is covered in s 24 of the Contracts Act 1950. However, its parameters are much wider where it involves the states and/or its agencies. Support for the proposition is found in a number of cases. Further, Lord Denning often has reminded us that judicial decision must not be confined to law but also common sense. Without application of common sense, a just result cannot be achieved. The common sense approach has been endorsed in a number of our decisions to name a few are as follows:

(a) in *Dato' Sri Zulkifli bin Omar & Ors v Ahmad Skhri bin Ramli and another appeal* [2015] 3 MLJ 669; [2015] 3 CLJ 752 the Court of Appeal had this to say:

> [19] It is also well established that no man can take advantage of his negligence or wrong doing or omission, etc based on the legal *maxim nullus commodum capere potese de inuria sua propri* (see *Grimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; [1987] 1 CLJ 123). This maxim is made applicable in various instances and not only confined to contractual principles as the maxim relates to common sense. In the instant case, the evidence will show that the plaintiff had already paid RM220,000 as early as 4 February 2008 and warrant of committal was only issued on 4 August 2009. Upon seeing the warrant he should have objected to the right channel with evidence but he did not do so. On the facts of the case, the learned trial judge ought not to have found in favour of the plaintiff.

(b) in *Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors* [2015] 3 MLJ 791, the Court of Appeal had this to say:

> [10] In our considered view, the learned trial judge's proposition or the ratio

> decidendi, if sustained, will result in this: security documents secured by banks in granting facility will become 'documents of liability'. This ultimately, will affect the banking industry in an unprecedented manner. Courts have repeatedly emphasised that judgments relating to commercial case must promote 'commercial certainty'. The common sense approach is also another factor which needs to be taken into account in a situation of lender and borrower. For example, the Privy Council in *Keng Soon Finance v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 applied the 'common sense approach' when it dealt with facility documents ...

[11] We will elaborate further why on the facts of the instant case, a common sense approach is an essential criteria to decide on the issues before the trial court. In addition, we will also elaborate that when an action is against the state or its agencies relating to damages, the court must be vigilant to ensure the exchequer is not short-changed. In England, the court's consideration on this ground will have nexus to public policy. In Malaysia, it also relates to constitutional oath of a judge to preserve, protect and defend the constitution. It will follow that if the exchequer is short-changed, the public will lose the benefit of that revenue and that will impinge on their fundamental rights guaranteed under the Federal Constitution, which by judicial oath the judge is entrusted to protect that. To put it bluntly, when the exchequer is directly and/or indirectly short changed by dubious claim and/or technical claim whether or not it arises in consequence of private contract or conduct of government or government agencies, it rests upon the court to arrest it though it may appear from the face of the record that the claim is justified according to general commercial or tortious principles, etc. That is to say, the judiciary has a greater role to play than the judges in England relating to public policy and its like (see *Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd* [2015] 2 MLJ 509).

[12] Whether it is a pleaded case of the parties or not is a non issue when it relates to illegality, public policy or issues such as, where the states exchequer will be short-changed. Support for the proposition is found in a number of cases. To name a few are as follows: (a) *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1; [2014] 7 CLJ 644; (b) *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212; (c) *Ayr Harbour Trustees v Oswald* [1883] 8 App case 623 (HL). Pleaded issues and the jurisprudence advanced by case law relates to party to the litigation only. The dimension for courts intervention cannot be caveated when issues such as illegality or public policy become apparent when it arises in consequence of conduct of government or government agencies or private persons, etc.

[13] In essence, the issue of vacant possession on the facts of the case is purely a technical issue and that cannot culminate to a cause of action to seek damages

and that too in millions of ringgit; that too when there is clear evidence and admission by the plaintiff to suggest that they could not have proceeded with the joint venture agreement profitably. The letter dated 5 March 2001 from the plaintiff reads as follows:

Tarikh: 5hb Mac 2001

PERMODALAN NEGERI SELANGOR BERHAD

25th Floor, Wisma MPSA,

Persiaran Perbandaran,

40000 Shah Alam,

Selangor Darul Ehsan.

(u/p: Md Yunus @ Iskandar bin Md Noor)

Tuan,

Per: USAHASAMA ANTARA PERMODALAN NEGERI SELANGOR BERHAD DENGAN PERBADANAN RIADAH SDN BHD BAGI CADANGAN PEMBANGUNAN KAWASAN PERINDUSTRIAN DI ATAS SEBAHAGIAN LOT 5317, MUKIM DENGKIL, DAERAH SEPANG, SELANGOR DARUL EHSAN SELUAS 90 EKAR.

- Cadangan Untuk Menukarkan Kegunaan Tanah Daripada Perindustrian Kepada Pembangunan Kediaman Bercampur.

Di sini pihak kami ingin merakamkan penghargaan dan amat berterima kasih di atas segala kepercayaan dan keyakinan daripada pihak tuan dalam memberi peluang kepada kami untuk bersama memajukan sebahagian lot 5317, Mukim Dengkil, Daerah Sepang, kepada cadangan pembangunan perindustrian. Untuk itu, kami amat menghargai di atas segala kerjasama yang telah diberikan oleh pihak tuan selama ini. Diharapkan segala apa yang terjalin selama ini di mana pihak tuan dan kami akan terus berkesinambungan di dalam mencorakkan pembangunan di dalam Negeri Selangor ini khususnya.

Hasil dari persetujuan tersebut, pihak kami dan pihak tuan telah menandatangani satu perjanjian usahasama pada 7hb April 1995 dan satu perjanjian tambahan pada 15hb Mei 1996. Berikutan perjanjian itu, pihak kami sedar bahawa satu tanggungjawab yang besar telah diberikan dan kami harus melaksanakan apa yang telah dipersetujui di dalam perjanjian tersebut. Dengan itu kami telah berusaha sedaya upaya untuk membangunkan tapak cadangan tersebut kepada sebuah kawasan perindustrian yang dapat memenuhi kehendak pasaran semasa.

Ketika ini, kedudukan tahap cadangan pembangunan tersebut telah sampai kepada peringkat kelulusan pelan susunatur dan pelan pra-hitungan yang mana ianya telah diluluskan oleh pihak Jabatan Perancang Bandar Dan Desa Negeri Selangor pada 28hb Februari 1996 dan 5hb April 1996 (Sesalinan kelulusan pelan dilampirkan). Berikutan dengan kelulusan tersebut pihak kami telah mengambil inisiatif untuk menjalankan kajian terhadap pasaran dengan mengikut penawaran dan permintaan terhadap premis-premis perindustrian buat masa itu. Malangnya pada ketika itu, kegawatan ekonomi telah melanda negara di mana ianya telah menyebabkan hampir kesemua para usahawan tempatan dan pelabur asing telah menerima akibatnya dan kesan turut dirasakan di seluruh negara.

Sehubungan itu, pelaburan dari pelabur asing yang merupakan asas kepada sektor perindustrian negara juga turut mengalami penurunan yang ketara. Pihak kami berasa amat sedih terhadap masalah kegawatan ekonomi yang telah menyebabkan aktiviti dalam sektor perindustrian menjadi kurang berdaya maju dan seterusnya menyebabkan Usahasama Antara Pihak Permodalan Negeri Selangor Berhad Dengan Perbadanan Riadah Sdn Bhd mengalami sedikit kelewatan. Pihak kami telah menjalankan berbagai usaha yang sepatutnya agar memastikan jualan terhadap premis-premis industri ini dapat menepati sasaran yang ditetapkan agar keuntungan terhadap kedua-dua belah pihak adalah terjamin. Walaupun begitu, usaha kami itu tidak menunjukkkan sebarang kesan positif yang memberangsangkan. Secara kolektifnya, masalah yang dihadapi sekarang oleh pihak Kami adalah berdasarkan kesukaran di dalam menjalankan penjualan terhadap premis-premis industri yang mana langsung tidak mempunyai permintaan yang sewajarnya.

Walau bagaimana pun, ingin dimaklumkan bahawa berikutan dengan kegawatan ekonomi yang berlaku, ianya telah menyebabkan kurangnya permintaan terhadap premis-premis dan kawasan-kawasan perindustrian. Sehubungan dengan perkara tersebut, dengan ini pihak kami ingin mencadangkan kepada pihak tuan agar dapat mengubahkan cadangan pembangunan tersebut kepada pembangunan kediaman bercampur. Terdapat beberapa faktor yang boleh diambil kira sebagai satu pendekatan untuk mengubah corak pembangunan itu, antaranya ialah:

a. PENGURANGAN DRASTIK TERHADAP PERMINTAAN INDUSTRI

Kegawatan ekonomi yang telah melanda negara pada suatu ketika dahulu telah meninggalkan banyak kesan terhadap pembangunan perindustrian negara. Ini adalah kerana kurangnya pelaburan dari para pelabur asing dan peniaga tempatan untuk melabur dalam sektor industri di rantau ini. Pengurangan yang mendadak ini telah menyebabkan kurangnya permintaan terhadap premis-premis industri dan seterusnya mengakibatkan pembangunan bagi kawasan industri tidak mendapat sambutan yang sewajarnya. Ini telah menyebabkan suatu keadaan di mana penawaran premis-premis industri telah melebihi dari permintaannya sendiri dan seterusnya akan menyebabkan sesuatu projek itu akan terbengkalai.

b. MENGELAKKAN KERUGIAN KEPADA PELBAGAI PIHAK

Dengan mengubahkan pembangunan di atas tapak cadangan tersebut daripada perindustrian kepada kawasan perumahan bercampur, ianya akan dapat mengelakkan kerugian kepada pelbagai pihak yang terbabit. Meneruskan pembangunan kepada kawasan perindustrian bererti akan mendedahkan kepada risiko tiada sambutan terhadap premis yang ditawarkan ini seterusnya akan menyebabkan kerugian yang besar terhadap pelbagai pihak yang berkaitan seperti pihak pemilik tanah, pemaju, jururunding, kerajaan, pihak berkuasa tempatan dan lain-lain. Langkah ini juga akan dapat mengelakkan dari berlakunya masalah pembangunan terbengkalai akibat dari tiadanya permintaan dari sektor perindustrian.

c. MENINGKATNYA PERMINTAAN TERHADAP KAWASAN KEDIAMAN

Permintaan bangunan-bangunan kediaman yang semakin meningkat dewasa ini adalah satu petunjuk yang baik di dalam sektor pembinaan. Di dalam mengimbangi permintaan yang semakin meningkat terhadap rumah kediaman,

pihak pemaju seharusnya peka terhadap kemampuan sesuatu kawasan untuk dibangunkan bagi tujuan tersebut. Memajukan tapak cadangan ini dengan kawasan kediaman adalah satu langkah yang paling bijak dan mempunyai kredibiliti dengan mengambilkira kedudukan tapak cadangan dan juga pembangunan sekitarnya. Ini seterusnya dapat membantu Kerajaan Negeri Selangor di dalam saranannya untuk menyediakan kawasan kediaman yang mencukupi untuk semua lapisan masyarakat dan mengatasi masalah rumah setinggan.

d. MENGGALAKKAN PENJUALAN UNIT KEDIAMAN YANG BERPATUTAN

Seperti mana yang sedia diketahui, permintaan terhadap premis industri masa kini adalah tidak begitu menggalakkan sama ada oleh pelabur tempatan mahu pun pelabur luar negara akibat daripada kegawatan ekonomi yang dihadapi sekarang. Satu alternatif yang terbaik untuk membangunkan tapak cadangan tersebut adalah dengan mengubah cadangan pembangunan tersebut kepada pembangunan kediaman bercampur. Maka dengan mengubahkan jenis pembangunan kepada kediaman bercampur, secara tidak langsung akan membolehkan pihak kami menyediakan unit kediaman yang berbagai jenis yang mana mempunyai harga berpatutan serta mampu dimiliki oleh semua golongan. Pihak kami berharap pihak tuan dapat mempertimbangkan permohonan kami ini.

Hasil dari kajian kami sebelum ini, sekiranya cadangan kami dapat diterima oleh pihak tuan, pihak kami mencadangkan untuk memajukan tanah tersebut dengan pelbagai jenis kediaman yang mampu memberikan pulangan yang baik dan dapat diterima oieh semua golongan masyarakat, di antaranya adalah seperti;

- Rumah Teres 1 dan 2 Tingkat
- Rumah Bandar (Town House)
- Kedai Apartment (Shop Apartment)
- Apartment/Rumah Pangsa

Oleh yang demikian, kami amat bersukacita sekiranya pihak tuan, dapat mempertimbangkan cadangan kami ini untuk mengubahkan cadangan pembangunan untuk perindustrian kepada kediaman bercampur kerana ianya dapat memberikan faedah kepada semua pihak. Dengan ini diharapkan agar keputusan tersebut dapat diumumkan kepada kami sewajarnya.

Kerjasama serta jasa baik pihak tuan dalam perkara ini sangat kami hargai dan terlebih dahulu diucapkan ribuan terima kasih.

Sekian.

Yang Benar

PERBADANAN RIADAH SDN BHD

[14] From the reading of the letter, it is clear that the plaintiff is not complaining of vacant possession but was suggesting that they could not proceed with the joint venture agreement profitably if the defendants do not agree to the variation of the development of the properties, ie to vary the light industrial development to a combination of Housing and Industrial

Development and/or words to that effect. Any reasonable tribunal reading this letter would not conclude the defendants were in breach of any obligation as per the plaintiffs letter, that too when the letter was written just before the expiry of the agreement itself.

JURISPRUDENCE RELATING TO COMMERCIAL REALITY, COMMON SENSE APPROACH, PUBLIC POLICY AND CONSTITUTIONAL OATH

[15] It is trite that the court has taken the concept of commercial reality as a consideration in construing contractual terms and enforcement thereof in various circumstances. Support for the proposition is found in a number of cases. To name a few are as follows:

(a) *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494;

(b) *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327;

(c) *Sejati Education Sdn Bhd v S3M Development (Sabah) Sdn Bhd* [2016] 2 MLJ 98; and

(d) *Marks and Spencer plc (appellant) v BNP Paribas Securities Services Trust Company (Jersey) Limited and another (respondents)* [2015] UKSC 72.

[16] In the instant case, any reasonable tribunal having perused the contents of the letter dated 5 March 2001 as well as the fact that the plaintiff had never shown any intention to seek possession of the property, will come to a conclusion that the plaintiff was disinterested in pursuing the joint venture agreement. Further, the plaintiffs' have also evinced an intention not to continue with the agreement just before the expiry of the joint venture agreement unless the defendant is prepared to consider the variations which in ordinary terms will stand as a counter offer which technically means that the plaintiff has no interest to proceed with the joint venture.

[17] In addition, the conduct of the plaintiff in not seeking any extension of time and allowing the memorandum of understanding to lapse will also indicate that they have no interest to proceed. The act of the defendant terminating the memorandum of understanding after the expiry of six years, taking into consideration the conduct of the plaintiff cannot in principle be faulted and in our view cannot give a cause of action to claim damages.

[18] As said earlier, Lord Denning in a number of judgments had asserted that a common sense approach at times needed to be taken to reach a just result. There is no shortage of English cases mentioning about common sense. In *Best v Wellcome Foundation Ltd* [1994] 5 Med LR 81, Finlay CJ had this to say:

> Function which a court can and must perform in the trial of a case in order to

acquire a just result, is to apply *common sense* and a careful understanding of the logical and likelihood of events to conflicting opinions and conflicting theories concerning a matter of this kind. (Emphasis added.)

[19] Common sense approach in our view is a necessary criteria in this case to reach a just result. In the instant case, the plaintiffs had demonstrated dilatory conduct as well as disinterestedness to proceed with the project for six years. In addition, the plaintiff by the letter dated 5 April 2001 makes suggestion that the project is not viable as per the judgment. In our considered view, any reasonable tribunal appraised with the facts will come to the conclusion that the plaintiff's action is an abuse of process of the court and the action ought to have been dismissed at limine. Reading in between the judgment, the learned trial judge would have taken a common sense approach had His Lordship not been influenced by the plaintiff's argument to be bound by the decision of the Court of Appeal on similar facts. As we had said earlier, judicial precedent are binding as to legal principles and not to assessment of a case where the trial judge is duty bound to consider various issues such as public policy, illegality, common sense approach, etc to arrive at a just decision.

[20] Quite recently, the Federal Court in the case of *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 had cautioned the trial court to be vigilant and take proactive steps when issue of public policy or illegality becomes apparent on the facts though parties have not raised in the pleadings. Jeffey Tan FCJ had this to say:

[35] Clearly, therefore, courts are bound at all stages to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded, and to refuse to enforce the contract. In that regard, we endorse the following statement of law by the Court of Appeal per Hamid Sultan JCA, delivering the judgment of the court, in *China Road & Bridge Corp & Anor v DCX Technologies Sdn Bhd and another appeal* [2014] 5 MLJ 1; [2014] 7 CLJ 644:

At the outset we must say that the trial courts must be vigilant not to provide any relief on contracts which is void on the grounds of public policy, or illegality ... whether or not it is the pleaded case of the parties or whether the issue was raised during the trial. The case of *Blay v Pollard & Morris* [1930] 1 KB 628 where Scrutton LJ observed:

Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment which has been followed in a number of local cases will not stand to tie the hands of judges to deal with the above issues, or arrest impropriety on its own motion at limine ...

[36] On the illustrations of lawful and unlawful considerations, need it be said that illustrations are illustrations and are not the be-all and end-all of all lawful and or unlawful considerations. Illustrations are 'examples of what would constitute lawful considerations and what would be considered unlawful and void' (*Lee Nyan Hon & Brothers Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626 per Abdul Malik Ishak JCA). 'An illustration to a statutory provision merely illustrates

> a principle and *ex hypothesi* it cannot be exhaustive. It is illustrative of the true scope and ambit of a section. It must be read subject to the relevant provision in the section itself ... Illustration merely illustrates a principle and what the court should try and do is to deduce the principle which underlies the illustrations. An illustration is a simple statement of facts to which the section itself has got to be applied. It only exemplifies the law as enacted in a statute ... The statement of law in the illustrations used in an Act cannot be taken as laying down substantive law, and does not bind the court to place a meaning on the section which is inconsistent with its language. If there be any conflict between the illustration and the main enactment, the illustration must give away to the latter. It is true that illustrations cannot control the language of a section, but they certainly afford a guidance to its construction. (*NS Bindhra Interpretation of Statutes*, (10th Ed) at pp 121–125).

[21] In addition, courts have a constitutional duty to be vigilant when states exchequer will be short-changed if by conduct of parties revenue will be affected. When revenue of the state is severely affected, it hits the public the most, the affected mass will be the poor and that will have nexus to fundamental rights provision in the constitution. Public revenue may be short-changed by many ways, for example: (a) the state or states agency may have entered into a purported contract with nominees with no intention of performing and allow the nominees to sue for damages. On public policy grounds, it is wrong by using such methodology in courts to get a judgment against the state or agencies to compensate the nominees who would not have done anything except complaining that the state or states agencies has defaulted. This is not permissible and the court must be vigilant even if consent judgment is attempted by the parties to be entered into in such circumstances; (b) another example, is when the state or its agency enters into a contract or concession for a long period and agrees to give a handsome compensation if the state or state agencies defaults or terminates the concession. The court has to be vigilant if the exchequer will be short- changed even though the contract may have all formalities of a valid contract and is good for enforcement. The English courts are vigilant when state exchequer is short changed. Similar issues relating to the example were dealt in the recent judgment of the Court of Appeal in *Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd* [2015] 2 MLJ 509 consisting of the coram of Balia Yusof bin Hj Wahi JCA, Hamid Sultan bin Abu Backer JCA and Abang Iskandar bin Abang Hashim JCA, where the court stated:

> ... If the term of the contract compromises the public right or state exchequer etc; the court is duty bound to strike down the infringing part on the grounds it will be ultra vires or void to exercise the powers to the detriment of the public (see *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623; Vijay Kumar Gupta). *In consequence, even parties entering into commercial contracts such as the instant case with the government or statutory bodies or its alike must be vigilant not to be a party to a term which is detriment to the public and/or state exchequer, etc; as such contract or term is not worth the paper it is written on.* (Emphasis added.)

[22] In the instant case, by allowing a claim purely based on a technical default, the state exchequer is bound to be short-changed and the court ought to have balanced the contractual rights with public interest in cases of this nature to arrive at a just decision. In the instant case, that was not done and in consequence the integrity of the decision making process has been compromised. It would have been different if the plaintiff had suffered loss and damage in consequence of genuine breach of the state and/or state agencies and where the plaintiffs had given due notice and time to remedy the breach. In the instant case, there was none.

[23] We have read the appeal records and the able submission of the learned counsel in detail. After giving much consideration to the submission of the learned counsel of the respondent and for the reasons stated above, we take the view that it is a fit and proper case to allow Appeal No B-01–343–09 of 2014 and in consequence dismiss the Appeal No B-02–1520–09 of 2014 and set aside the order of the court dated 31 July 2014.

[24] The plaintiff is to pay the costs of RM15,000 to the first defendant for both the appeals. Deposit to be refunded.

We hereby ordered so.

Appeal No B-01–343–09 of 2014 allowed and Appeal No B-02–1520–09 of 2014 dismissed with costs.

Reported by Kanesh Sundrum